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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

THE BOARD OF EDUCATION OF THE WESTSIDE COMMUNITY SCHOOLS, et al.,

Petitioners,

v.

BRIDGET MERGENS, et. al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF AMICUS CURIAE OF CONCERNED WOMEN FOR AMERICA IN SUPPORT OF RESPONDENTS

JORDAN W. LORENCE*
CIMRON CAMPBELL
MARK N. TROOBNICK
Concerned Women for America
370 L'Enfant Promenade, S.W.
Suite 800
Washington, D.C. 20024
(202) 488-7000
**Counsel of Record*

WENDELL R. BIRD
1150 Monarch Plaza
3414 Peachtree Road, N.E.
Atlanta, Georgia 30326
(404) 264-9400
Attorneys for Amicus Curiae

PRESS OF RAM PRINTING, HYATTSVILLE, MD 20781 (301) 864-6662

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BRIEF AMICUS CURIAE OF CONCERNED WOMEN FOR AMERICA IN SUPPORT OF RESPONDENTS

INTEREST OF AMICUS IN THIS CASE

Concerned Women for America (CWA) is a national, nonprofit organization representing approximately 600,000 people. The purpose of Concerned Women for America is to preserve, protect and promote traditional and Judeo-Christian values through education, legal defense, legislative programs, humanitarian aid, and related activities. Lawyers for CWA have appeared

before this Court representing the successful petitioner in *Witters* v. *Washington Department of Services for the Blind*, 474 U.S. 481 (1986), as well as in many amicus briefs.

CWA's position on equal access, which is like that of many other religious and secular organizations, is as follows:

> We believe that the nation's public schools must once again respect equally the rights of students and teachers who have religious beliefs along with those who do not. The right to voluntarily pray, read the Bible, or meet for religious discussion is necessary to achieve such equal treatment . . . . We continue to support the principle of equal access for religious student groups and call for vigorous enforcement of the law in this regard.

During 1984, CWA publicly supported the Equal Access Act, which did become law (20 U.S.C. § 4071 et seq.) and is at issue in this case. CWA supports the student-respondents in this case, and urges this Court to affirm the ruling of the Eighth Circuit in this case. 867 F.2d 1076 (8th Cir. 1989).

ARGUMENT

I. THE FIRST AMENDMENT PERMITS THE STUDENTS TO MEET ON CAMPUS, REGARDLESS OF WHETHER THE PUBLIC SCHOOL MAINTAINS AN OPEN FORUM

The Eighth Circuit ruled correctly in this case that the high school maintained an open forum, and therefore, the students who wanted to meet to study the Bible and pray could not be denied access to school facilities simply because of their religious beliefs and practices. The Eighth Circuit applied the obvious precedent of *Widmar* v. *Vincent*, 454 U.S. 264 (1981) in reaching its decision.

The Eighth Circuit saw this as a free speech case, coming under the "open forum" aspect of the Free Speech Clause.[1]

Although the school in this case did operate an open forum, this Court can rule in favor of the students, based on the students' First Amendment rights, with no reference to the open forum doctrine. Amicus Concerned Women for America argues that the students have a right under the Free Speech Clause and the Free Exercise Clause to meet on school property, apart from their right to meet under the "open forum" aspects of the First Amendment.

In other words, two kinds of First Amendment rights are at issue in this case. One is the *Widmar* "equal access-open forum" right. The other is the *Tinker* right of student expression in the public schools. Concerned Women for America argues that public schools have a constitutional duty to permit student religious meetings, regardless of whether the school is an open forum, unless those meetings would materially and substantially disrupt the functioning of the school, which is a rare situation.

A. Tinker Established A Right To Student Speech In Non-Open Forum Settings Within The Public School.

It is important to underscore that the constitutional rights of students to free expression in the public schools exist *independent* of the open forum doctrine. This Court has never limited student expression rights *solely* to the context of an open forum in a public school.

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[1] 867 F.2d at 1078-1080.

For example, in *Tinker* v. *Des Moines Community School District*, 393 U.S. 503 (1969), this Court ruled that high school officials could not stop students from wearing black armbands to school to protest the Vietnam War, unless the armband-wearing "materially disrupts classwork or involves substantial disorder or invasion of the rights of others." 393 U.S. at 513. In that important case, this Court found that students have a right to expression under the Free Speech Clause, without any discussion of the open forum doctrine. Indeed, the high school hallways and classrooms in *Tinker* clearly were not open forums, yet students still have protected rights to expression in those places.[2]

Tinker did not limit its holding to student self-expression (e.g., the wearing of armbands, buttons, etc.), but extended the holding to include students meeting with other students for expressive activities:

> The principal use to which the schools are dedicated is to accommodate students during prescribed hours for the purpose of certain types of activities. *Among those activities is personal intercommunication among the students*. This is not only an inevitable part of the process of attending school; it is also an important part of the educational process. A student's rights, therefore, do not embrace merely the classroom hours. When he is in the cafeteria, or on the playing field, or on the campus during the authorized hours, he may express his opinions, even on controversial subjects like the conflict in Vietnam, if

[2] The Ninth Circuit followed the *Tinker* decision recently when it ruled that high school students have a First Amendment right to distribute a non-school-sponsored "underground" newspaper to their fellow students, and to avoid predistribution review by school officials. *See Burch* v. *Barker*, 861 F.2d 1149 (9th Cir. 1988). The Ninth Circuit rooted its decision in *Tinker*, not in the open forum doctrine.

> he does so without "materially and substantially interfer[ing] with the requirements of appropriate discipline in the operation of the school," and without colliding with the rights of others.

393 U.S. at 513.

The rights outlined by this Court in *Tinker* apply to groups of students, as well as individual students. It makes no difference whether a public school is an open forum or not. If students desire to meet in small groups to discuss topics of mutual interest, school officials must accommodate their free speech rights, unless the student meeting would materially and substantially interfere with the operation of the educational process in the schools.

Later Supreme Court decisions have not cut back on this broad definition of student expressive rights in the public schools. In *Hazelwood School District* v. *Kuhlmeier*, 484 U.S. ___, 98 L.Ed.2d 592 (1988), this Court allowed school officials to edit and eliminate student-written stories from the high school newspaper. This Court clearly stated that the issues in *Hazelwood* differed sharply from the issues in *Tinker*. This Court said:

> *[Tinker]* addresses educators' ability to silence a student's personal expression that happens to occur on the school premises. *[Hazelwood]* concerns educators' authority over school-sponsored publications, theatrical productions, and other expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school.

98 L.Ed.2d at 605.

This Court in *Hazelwood* said that school officials may restrict student speech that is *school-sponsored*, but that the *Tinker* standards apply for student speech that is not school-sponsored:

> Accordingly, we conclude that the standard articulated in *Tinker* for determining when a school may punish student expression need not also be the standard for determining when a school may refuse to lend its name and resources to the dissemination of student expression. Instead, we hold that educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns.

98 L.Ed.2d at 606.

The students here, as in *Tinker*, do not hold meetings that are "school-sponsored." They seek a place on campus to meet and share their thoughts and ideas on their common religious beliefs. Accommodation of their desire to meet is no more government endorsement of religion, than was accommodation of Tinker's armband government endorsement of the anti-Vietnam War movement.

Similarly, in *Bethel School District No. 403* v. *Fraser*, 478 U.S. 675 (1986), this Court reaffirmed the principles of *Tinker*, but said they did not apply in that case.[3] This Court approved the school's punishment of a student for his nominating speech endorsing another student. This Court focused on the fact that the speech was filled with sexual innuendo and vulgarity, and that the student spoke at a school-sponsored forum.

These two later cases do not undercut *Tinker*, but merely clarify that *Tinker* refers to student speech not sponsored by the school. Applying the *Tinker* standard to the case at bar, the school must permit the students' Bible study, because it is not school sponsored and because it

[3] 478 U.S. at 680.

does not materially or substantially disrupt the educational process.

II. THE STUDENTS HAVE THE RIGHT TO MEET UNDER THE FREE EXERCISE CLAUSE

A. The School Officials Violated the Students' Free Exercise Rights By Forbidding The Bible Study Club.

The students have the right to meet under the Free Exercise Clause, as well as the Free Speech Clause. This Court has stated the test to evaluate cases under Free Exercise Clause as that the students must show that their beliefs are sincere and rooted in religion,[4] and that their beliefs are burdened by the government's actions.[5] The government then must show that its burden on the religious beliefs is "essential to accomplish an overriding governmental interest,"[6] and is the least restrictive means to meet that interest.[7]

The students in this case have religious beliefs about meeting together after school hours on school grounds for a Christian Bible Study Club.[8] The school officials refused to permit the student club to meet.[9] The school's actions burdened the Free Exercise rights of the students.

[4] *Wisconsin* v. *Yoder*, 406 U.S. 205, 215 (1972).

[5] *Sherbert* v. *Verner*, 374 U.S. 398, 404 (1963).

[6] *U.S.* v. *Lee*, 455 U.S. 252, 257 (1982). In *Wisconsin* v. *Yoder*, 406 U.S. 205, 215 (1972), this Court characterized the compelling state interest requirement this way: "only those interests of the highest order and those not otherwise served can overbalance legitimate claims to free exercise of religion."

[7] *Thomas* v. *Review Board*, 450 U.S. 707, 718 (1981).

[8] 867 F.2d at 1077.

[9] *Id.*

The school here can only offer two arguments to justify its burden on the students' rights, and both arguments fail to support the school: the student's religious beliefs are not burdened, because they can meet off-campus, and allowing the student meetings would violate the Establishment Clause.

B. The School Is Not Permitted To Prohibit The Student Meeting, On The Claim That They Can Meet Elsewhere.

The school district cannot prohibit the students from meeting for Bible study on campus by claiming that they could meet elsewhere. First, the school district did not demonstrate that other suitable facilities exist.

Second, even if other facilities did exist, their existence is constitutionally irrelevant. It is well-settled that the government cannot deny a person his constitutional rights merely because he could exercise them somewhere else. In *Grayned* v. *City of Rockford*, 408 U.S. 104 (1972), this Court quoted an earlier case to reiterate:

> It goes without saying that "one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place."

408 U.S. at 119 n. 40, quoting *Schneider* v. *State*, 308 U.S. 147, 163 (1939).[10]

In *Consolidated Edison* v. *Public Service Commission*, 447 U.S. 530 (1980), this Court said:

> We have consistently rejected the suggestion that a government may justify a content-based prohibition by showing that speakers have alternative means of expression.

[10] *See also Spence* v. *Washington*, 418 U.S. 405, 411 n. 4 (1974).

447 U.S. at 541, n. 10.

In *Southeastern Promotions Ltd.* v. *Conrad*, this Court faced the argument that a municipal auditorium could deny use for a production of the play, "Hair," because other facilities existed for the play. This Court rejected that argument:

> Whether petitioner might have used some other, privately owned, theater in the city for the production is of no consequence . . . . One is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place.

420 U.S. at 556.

Therefore, the school district cannot deny access for the student Bible Club on the ground that the students might be able to meet somewhere else.

C. School Accommodation Of The Student Bible Study Would Not Violate The Establishment Clause.

This Court has ruled that government has a "duty to *accommodate*" religious beliefs and practices, and that such accommodation does not result in unconstitutional *endorsement* of religion, in violation of the Establishment Clause. In *Lynch* v. *Donnelly*, 465 U.S. 668 (1984), the majority said:

> [The First Amendment] affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any.

465 U.S. at 673.

In *Hobbie* v. *Unemployment Appeals Commission*, 480 U.S. 136 (1987), this Court repeated that concept:

> This Court has long recognized that the government may (and sometimes must) accommodate religious practices and that it may do so without violating the Establishment Clause.

480 U.S. at 144.

The school district misunderstands this crucial point of law, because it deems any accommodation of student religious activities to violate automatically the Establishment Clause. This is clearly not the law.

For example, a group of devout Moslem students might enroll at the high school in this case. One of the five major tenets of Islam requires all Moslems to pray facing Mecca five times a day.[11] One of those times falls within the school day (prayer required immediately after noon).[12] If the Moslem students ask school officials for a secluded spot in the school where they may unroll their prayer rugs and pray to Allah, the school district certainly would not violate the Establishment Clause by accommodating their Islamic beliefs. Yet, in this case, the school district's extreme position would compel it to prohibit the Moslem students from meeting, claiming the accommodation of their prayers would violate Establishment Clause. No part of the Constitution and no decision of this Court demands such a harsh response to student religious expression.

This Court has cautioned officials not to use the Establishment Clause as an excuse to justify mistreatment of religious people. In *McDaniel* v. *Paty*, 435 U.S. 618 (1978), this Court struck down an exclusion of ministers

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[11] *Islam*, 22 Encyclopedia Britannica: Macropedia 1, 13 (15th ed. 1985).

[12] *Id.*

from state offices. Justice Brennan, in his concurring opinion, said:

> The Establishment Clause, properly understood, is a shield against any attempt by government to inhibit religion as it has done here [citations omitted]. It may not be used as a sword to justify repression of religion or its adherents from any aspect of public life.

435 U.S. at 641. He added:

> The Establishment Clause does not license government to treat religion and those who teach or practice it, simply by virtue of their status as such, as subversive of American ideals and therefore, subject to unique disabilities.

Id.

The school district's actions, in effect, interpret the Establishment Clause mandate too harshly, by erroneously showing "callous indifference" toward religious groups. *Zorach* v. *Clauson*, 343 U.S. 306, 314 (1952). This is not what the Establishment Clause requires. School district accommodation of the Christian students' religious practices does not violate the Establishment Clause. The school district does not endorse the students' religious beliefs merely by allowing them to meet.

CONCLUSION

The Eighth Circuit correctly ruled that the high school in this case operated an open forum, and that the students should be allowed to meet to study the Bible under the Equal Access Act and the First Amendment's open forum doctrine, enunciated in *Widmar* v. *Vincent*, 454 U.S. 263 (1981). Even if the school did not operate an open forum, the students also have a right to meet under First Amendment principles of *Tinker* v. *Des Moines School District*,

393 U.S. 503 (1969). Concerned Women for America urges this Court to affirm the judgment of the U.S. Court of Appeals for the Eighth Circuit in this case.

Date: October 2, 1989

Respectfully submitted,

JORDAN W. LORENCE*
CIMRON CAMPBELL
MARK N. TROOBNICK
Concerned Women for America
370 L'Enfant Promenade, S.W.
Suite 800
Washington, D.C. 20024
(202) 488-7000
**Counsel of Record*

WENDELL R. BIRD
1150 Monarch Plaza
3414 Peachtree Road, N.E.
Atlanta, Georgia 30326
(404) 264-9400
Attorneys for Amicus Curiae